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No. 07-484

IN THE

Supreme Court of the United States

SEMEN LEYKIN, *et al.*,

Petitioners,

v.

AT&T CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS RESTATED

Whether the Second Circuit correctly held that petitioners had not stated a claim for securities fraud under Section 10(b) of the Securities Exchange Act and Rule 10b-5 where (1) the alleged misrepresentations and omissions of material facts concededly did not cause a reduction in the stock price or losses to petitioners during the class period and (2) the remaining allegations were acts of corporate mismanagement and breaches of fiduciary duties that are not actionable as securities fraud under the Securities Exchange Act of 1934 and that were independent of any securities transactions?

PARTIES TO THE PROCEEDING

The Petition (p. iii) lists the individuals and corporations that are now parties to this proceeding.

Pursuant to Rule 29.6, respondent AT&T Corp. states that it is a wholly-owned subsidiary of AT&T Inc., a publicly traded company.

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioners are here seeking review of an unpublished summary order in which the Second Circuit upheld the dismissal of a private securities fraud complaint for failure to state a claim upon which relief can be granted under Sections 10(b) and 14(a) of the Securities Exchange Act of 1934.

This Second Circuit order does not present the questions, or the conflicts with other decisions, that are alleged in the Petition. Rather, as petitioners correctly stated below, the claims that they have raised are "*sui generis*," and the Second Circuit's summary order is a correct application of well-settled principles to quite unique factual allegations.

First, petitioners' primary claim was barred by their inability to allege loss causation under the standards of *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), and of each federal court of appeals to have addressed this issue. Petitioners alleged that respondents made fraudulent misrepresentations and omissions that inflated the stock price of At Home Corporation. However, the allegations of the complaint also established that petitioners' stock had lost its value for other independent reasons long *before* the alleged concealed facts were revealed to the market.

Second, petitioners' remaining allegations did not raise any novel issues about the scope of "scheme" liability under Section 10(b). To the contrary, those allegations consisted of claims of corporate mismanagement and abuse that are actionable only as state law breach of fiduciary duty claims and that also were independent of any securities transactions. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478-79 (1977); *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 545-546 (2d Cir. 1967).

In this regard, this case does not raise, and the Second Circuit did not address, the question presented in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, No. 06-43: whether private 10b-5 actions can be maintained against third parties who make no misrepresentations but who allegedly engaged in transactions with a stock issuer that had the purpose and effect of misleading the public about the financial condition of the issuer. There is thus no reason to hold this case for *Stoneridge*.

COUNTERSTATEMENT OF THE CASE

1. At Home Corporation ("At Home") was a provider of Internet services. At the beginning of the period at issue in this case, over half of At Home's revenues were from Internet content services offered in competition with entities like Yahoo. The rest of its revenues were from wholesale Internet access services provided to AT&T, Cox, Comcast, and other operators of cable television systems.

AT&T Corp. was a major shareholder with representation on At Home's board throughout the relevant period. In addition, AT&T acquired full voting control of At Home in August 2000 as a result of stock purchases (via a put agreement) with Cox and Comcast and other transactions announced in March 2000.

Throughout its existence, At Home had quarterly losses of many hundreds of millions of dollars and disclosed the substantial financial and business risks that it faced in its SEC filings and other public statements. Nonetheless, At Home enjoyed a stock price of over $90 per share at the height of the Internet "bubble," and its stock price was $49 per share at the beginning of the class period. Following the bursting of the Internet bubble in March 2000, At Home's stock price fell in virtual lockstep with Internet stock indices (App. 37a & n.13), and it was pennies per share when At Home declared bankruptcy on September 28, 2001. At Home ceased operations shortly thereafter.

2. This action was brought on behalf of all persons who had purchased the stock of At Home between November 9, 1999 and September 28, 2001 ("the class period"). The defendants now consist of AT&T Corp.

and various of its officers who were directors or officers of At Home (collectively referred to as "AT&T respondents") as well as a former At Home officer, Mark McEachen.[1] The issue in this case is the legal sufficiency of Plaintiffs' Proposed Third Amended Complaint ("PTAC").

In the PTAC, petitioners essentially made two sets of allegations. First, they alleged a traditional securities fraud action. They contended At Home had made misrepresentations and omissions that had artificially inflated the price of At Home's stock throughout the class period (and that AT&T and the individual defendants were liable for this conduct as "control persons" under § 20(a) of the Securities Exchange Act and/or as signatories of SEC documents).

In particular, petitioners' primary allegation was that At Home had stated that it was protecting the intellectual property that was critical to its success, but that these statements were false and misleading because At Home knew that AT&T was copying and misappropriating At Home's intellectual property. Petitioners also alleged that At Home's financial statements had not fully disclosed the precariousness of its financial condition – a claim that petitioners have dropped in this Court. The District Court dismissed both of these allegations for failure to plead "loss causation" within the meaning of *Dura*, and the Second Circuit summarily affirmed this holding.

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[1] In the lower courts, petitioners also pursued claims against Comcast, Cox, Kleiner Perkins Caufield & Byers, and various individual defendants. Petitioners dropped their claims against these other parties in this Court.

Second, petitioners made a series of allegations to the effect that AT&T had abused its position as a major and, later, controlling shareholder of At Home and committed a number of acts that weakened At Home financially, pressured it into allowing AT&T to access and copy intellectual property, and caused or contributed to At Home's bankruptcy. These included announcing "open access" on December 6, 1999, requiring At Home to prepare its network to provide this access, agreeing to acquire voting control of At Home in March 2000, requiring At Home to increase its capital expenditures, interfering with At Home's efforts to obtain financing, and other similar conduct. App. 9a-12a; Pet. at 8-14. Petitioners alleged that all this conduct was part of a single nefarious "scheme" that was designed to enable AT&T first to maintain At Home in a weakened state while AT&T copied its technology and then to end its life and begin using At Home's technology to provide wholesale Internet access service itself.

All petitioners' "scheme" allegations were expressly derived from a parallel state court action in which a trustee for At Home sought to recover (on behalf of shareholders and bondholders) damages for alleged breaches by AT&T of its fiduciary duties as At Home's controlling shareholder. *See* PTAC, ¶¶ 55, 58, 59(e)-(q), & 110(b) (referring to this action by name and repeating allegations from it). This state court suit is the action that AT&T settled for $400 million (out of a claimed $3 billion). *See* Pet. at 13.

Petitioners alleged that the nondisclosure of AT&T's purported scheme to harm At Home had artificially inflated the price of At Home's stock throughout the class period. At the same time, although this action was brought on behalf of persons

who purchased stock at these purportedly inflated prices during the class period, petitioners incongruously alleged that AT&T's abusive conduct had simultaneously *deflated* At Home's stock price. In particular, they claimed that AT&T's conduct artificially lowered the price of At Home's stock both at the virtual inception of the class period (the December 6, 1999 open access announcement) and at a date early in the class period (the March 2000 announcement of the transaction in which AT&T would acquire voting control). Petitioners maintained that their allegations that acts of mismanagement artificially reduced At Home's stock price rendered their securities law claims "*sui generis*" and somehow supported the fraud claims that they brought as *purchasers* of securities. Appellants' Corrected Reply Brief, p. 39 (Filed in Second Circuit Dec. 5, 2006).

3. The District Court held that the PTAC did not state a claim for securities fraud and the Second Circuit summarily affirmed this ruling.

First, the District Court assumed, *arguendo,* that petitioners had sufficiently pled misrepresentations and omissions within the meaning of Rule 10b-5 by alleging that At Home had stated that it was protecting its intellectual property without disclosing AT&T's alleged misappropriation of it. But the District Court held that these allegations were insufficient to state a securities fraud claim because petitioners had not (and could not) allege that their losses had been caused by these misrepresentations and omissions, rather than by the collapse in the Internet economy and other subsequent independent events. Indeed, as the District Court explained, the facts admitted in the PTAC established that

petitioners' At Home shares lost all their value for these other reasons long before AT&T's purported misappropriations could have been known to the market. App. 34a-39a.

Second, the District Court held that petitioners' remaining allegations of an undisclosed AT&T "scheme" to harm At Home did not state a claim for securities fraud. It concluded these allegations represented acts of "corporate mismanagement and abuse" that are actionable only under state law, and not as "securities fraud." App. 29a. Specifically, the District Court held that the scheme alleged here involved, at most, purported "corporate abuse, misconduct and diversion of assets, but no transactions in the relevant securities. Its success depended on the misappropriation of At Home's propriety technology, without regard to any transactions in At Home stock." App. 27a-28a. To the extent petitioners complained that AT&T's conduct had lowered the price at which Cox and Comcast agreed to sell stock to AT&T in March 2000, the District Court held that this was "antecedent, but not integral, to" any scheme affecting purchasers of AT&T's stock. App. 28a. For these reasons, the Court held that AT&T's scheme was not "in connection with the purchase or sale of securities." *Id.*

In addition, the District Court dismissed petitioners' claim that At Home had violated § 14(a) of the Securities Exchange Act when it did not disclose AT&T's alleged "scheme" in the proxy solicitation that sought shareholders' approval of the March 2000 agreements that gave AT&T voting control of At Home. The Second Circuit affirmed the District Court's dismissal of these claims as well

(App. 4a), and petitioners have not sought review of these rulings.

REASONS FOR DENYING THE PETITION

The summary order of the Second Circuit is manifestly unworthy of this Court's review. This case is a contrived attempt to take state law claims for mismanagement of a corporation by a controlling shareholder – which were previously fully litigated and settled for $400 million – and now bring them as a federal securities fraud action. Petitioners made this attempt by alleging misrepresentations and omissions that were barred on the face of the complaint because of the absence of loss causation and by then contending that the existence of these alleged misrepresentations allowed the petitioners to use the securities laws to challenge purported acts of corporate mismanagement that allegedly weakened At Home financially during the class period.

The dismissal of this action was a correct application of well-settled principles to a set of factual allegations that petitioners have conceded are *sui generis*. It does not conflict with any decision of this Court or of any other federal court of appeals. The only way petitioners can even argue otherwise is by misstating the lower courts' holdings.

I. DISMISSAL OF THE "SCHEME" CLAIMS WAS A CORRECT APPLICATION OF SETTLED PRINCIPLES

The primary issue that petitioners seek to have this Court review is the lower courts' holding that petitioners cannot use the federal securities laws to litigate claims that a controlling shareholder breached fiduciary duties to the corporation and to

minority shareholders by engaging in self-dealing and otherwise acting to harm the corporation. However, as this Court and federal courts of appeals have repeatedly held, such allegations raise claims under state corporation law and cannot be converted into federal securities fraud claims by alleging that it was a fraud for the corporation to fail to disclose the breaches of fiduciary duties or the acts of mismanagement by the controlling shareholder. *See Santa Fe Indus., Inc. v. Green,* 430 U.S. 462 (1977). *Santa Fe* concluded that this alleged misconduct is not actionable under the plain meaning of Section 10(b). *Id.* 473-77. The Court further held that even if the terms of Section 10(b) were ambiguous, the Court would not construe them in a manner that would permit state breach of fiduciary duty claims to be brought in federal courts, for that would federalize much of state corporation law and create complex issues of apportioning damages. *Id.* at 477-79.

Petitioner's assertion (Pet. at 18) that Section 10(b) provides a remedy for any undisclosed breaches of fiduciary duties is simply wrong. In addition to *Santa Fe,* this Court has held that Section 10(b) is not an "all-purpose breach of fiduciary duty ban" (*United States v. O'Hagan*, 521 U.S. 642, 655-56 (1997)) and that "internal corporate mismanagement" is outside the Act. *Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 9-12 (1971); *accord SEC v. Zandford*, 535 U.S. 813, 820 (2002).

The decision that the lower courts relied upon – *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 545-46 (2d Cir. 1967) – was a precursor of *Santa Fe. Mutual Shares* dismissed securities law claims brought by minority shareholders where, as here, a

majority shareholder had acquired a controlling block of shares from third parties and had not disclosed an alleged scheme to loot the corporation. *Mutual Shares* held that such allegations present only state law claims and that any claim of fraud here is not "in connection with the purchase or sale of any security" within the meaning of the Securities Exchange Act. 15 U.S.C. § 78j(b).

Petitioners here purport to accept the rule of *Santa Fe* and *Mutual Shares*. Pet. at 19. But they argue that the rule should not apply to this case because petitioners alleged (1) that it was a misrepresentation or omission for At Home to represent that it was protecting its intellectual property without disclosing that AT&T was misappropriating it and (2) that AT&T's acts of mismanagement were intended to enable the misappropriations by weakening At Home and were thus somehow part of a single overall nefarious "scheme." But the rule of *Santa Fe* would be meaningless if it could be evaded through such allegations.

Here, moreover, the claimed misrepresentations and omissions were barred on the face of the complaint by petitioners' failure and inability to plead loss causation under *Dura*. If petitioners' scheme theory were accepted, the only issues that would have been litigated in this case would have been whether it had been a breach of AT&T's fiduciary duties for it to have done such things as requiring At Home to increase its capital spending, refusing to provide At Home with favorable financing, deciding to offer open access to other Internet service providers, and obtaining access to At Home's intellectual property for purposes of testing open access or helping At Home address provisioning

problems. PTAC, ¶¶ 59, 60, 81, 83, 89, 91(b) & 100. These allegations epitomize matters that are exclusively addressed under state corporate law and that cannot support a claim of securities fraud.

Against this background, it is ironic that petitioners' principal argument is that the Second Circuit here decided the same question involving the scope of "scheme" liability under SEC Rule 10b-5(a) & (c) that is now before the Court in the *Stoneridge* case and in a second case that presumably is being held for *Stoneridge*.[2] In particular, petitioners contend the Second Circuit has "limit[ed] the scope of conduct prohibited by Rule 10b-5 to misrepresentations," and has "further exclud[ed] deceptive conduct from consideration as part of a scheme to defraud" – in conflict with decisions of the Fifth, Eighth, and Ninth Circuits. Pet. at 29.

But the Second Circuit's summary order did no such thing. It summarily affirmed a decision of the District Court that held that "subparagraphs (a) and (c) of Rule 10b-5 do *not* require a misstatement or omission" and that did not address whether deceptive conduct is actionable. *Id.* at 19a (emphasis added). The Second Circuit simply held that "the plaintiffs here have failed to allege that the AT&T defendants' conversion scheme was in connection with the

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[2] Pet. at 28-31. *In re Charter Commc'ns, Inc. Sec. Litig.*, 443 F.3d 987 (8th Cir. 2006), *cert. granted sub nom. Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 127 S. Ct. 1873 (2007) (No. 06-43); *Regents of Univ. of Calif. v. Credit Suisse First Boston, Inc.*, 482 F.3d 372 (5th Cir. 2007) ("*Regents*"), *petition for cert. filed*, 75 U.S.L.W. 3557 (U.S. Apr. 5, 2007) (No. 06-1341); *see also Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040 (9th Cir. 2006), *petition for cert. for filed*, 75 U.S.L.W. 3236 (U.S. Oct. 19, 2006) (No. 06-560).

purchase or sale of securities" because it involved claims of mismanagement that are not actionable as securities fraud. App. 3a. As to that holding, there is no conflict among the courts of appeals.

By contrast, *Stoneridge*, *Simpson*, and *Regents* concern "the scope of primary liability for *secondary* actors." *Regents*, 482 F.3d at 386. In all three cases, the issue was whether non-speaking parties could be liable as primary violators of Section 10(b) when they engaged in transactions with a public corporation with no legitimate business or economic purpose except to inflate artificially the public corporation's financial statements. *Stoneridge* Pet. at i (question presented). The Ninth Circuit held that "such conduct may be in connection with the purchase or sale of securities if it is part of a scheme to misrepresent public financial information where the scheme is not complete until the misleading information is disseminated into the securities market." *Simpson*, 452 F.3d at 1052.

This case does not remotely present any such issues. There is no issue here involving the liability of secondary actors who are not alleged to be "control persons" under § 20(a) of the Securities Exchange Act. Nor does the case present the issue whether 10b-5 liability can be based on "deceptive devices" other than misrepresentations or omissions. Similarly, the Second Circuit did not here address a scheme that had the purpose of misleading the markets through inflated financial statements and that was not "complete until misleading information is disseminated." *Simpson*, 452 F.3d at 1052. Rather, it simply held that the alleged scheme to harm At Home – which did not involve any actionable misrepresentations or omissions and whose purpose

was allegedly to steal At Home's proprietary information for AT&T's own use – was not in connection with the purchase or sale of securities. App. 3a. *See also* App. 26a-29a.

In short, the Second Circuit's decision does not even address the issue in *Stoneridge*, *Simpson*, and *Regents*, much less conflict with those cases. There is thus no reason to hold this case for *Stoneridge*.

In addition, petitioners are wrong insofar as they are also asserting that the holding that petitioners' mismanagement claims were not "in connection with the purchase or sale of securities" conflicts with prior decisions of this Court. Pet. at 18. The decisions on which petitioners rely hold that to constitute a deceptive scheme in connection with the purchase or sale of securities, stock transactions must coincide with or be an integral part of the deceptive scheme. *See Zandford*, 535 U.S. at 815-16 (broker sold client's securities, redeemed checks, and embezzled proceeds without disclosure to client where broker had a duty to disclose); *United States v. O'Hagan*, 521 U.S. 642, 655-56 (1997) (fiduciary used confidential information to purchase and sell securities without disclosure to his principal where fiduciary had a duty to disclose); *Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 7-9 (1971) (defendants "duped" company's directors into authorizing sale of company's treasury bonds in exchange for company's own assets where they had duty to disclose).[3] As the

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[3] *See also Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152-55 (1972) (alleged misrepresentations were used by bank employees for the purpose of acquiring stock below its fair value); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (noting that the fraud must, at least, "'coincide' with a securities transaction" and expressly following

District Court here held, AT&T's alleged scheme was independent of any stock transactions, for it "depended on misappropriation of At Home's proprietary technology, without regard to any transactions in At Home's stock." App. 28a. The Second Circuit summarily affirmed this holding.

In this regard, it is irrelevant that AT&T entered into an agreement that provided for the acquisition of a block of shares from Cox and Comcast that gave AT&T undisputed voting control of At Home during the class period. This Court has held that claims under Section 10(b) cannot be based on otherwise legitimate securities transactions independent of the alleged fraud. *See Zandford*, 535 U.S. at 819-820 (the "in connection with" requirement is not met where "after a lawful transaction had been consummated, a broker decided to steal the proceeds and did so" or where "a thief simply invested the proceeds of a routine conversion in the stock market"). Here, the District Court correctly applied this standard, holding that the transaction with Cox and Comcast was "antecedent to" and independent of the alleged fraud. App. 28a.

This principle has special force here because petitioners do not allege that there was any deception in AT&T's agreement to acquire securities from Cox and Comcast. App. 28a, 29a & 41a. In this regard, even if AT&T's conduct somehow lowered the stock price that it would have to pay Cox and Comcast (*see* Pet. at 10), that conduct is irrelevant to the claims petitioners have brought on behalf of all persons who allegedly *purchased* At Home's shares at artificially inflated prices during the class period. *Id.* at 2.

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and reaffirming *Zandford* in the context of affirmative misrepresentations to the marketplace).

Petitioners also attempt to justify review of these issues by contending that SEC Regulation S-K, Item 404(a) required AT&T to disclose its misappropriations of At Home's intellectual property in the proxies that were sent to shareholders in connection with the March 2000 agreements and in other SEC filings. Pet. at 21. This claim, too, is unworthy of this Court's review. This SEC Regulation requires disclosures of "transactions" between major shareholders and a corporation. AT&T's alleged misappropriations of At Home's intellectual property is not a "transaction" within the ordinary meaning of this term, and this term, too, cannot be construed in a manner that would make state law breach of fiduciary duty claims actionable as securities fraud. *See Santa Fe,* 430 U.S. at 477-79. Further, the Second Circuit's correct construction of this SEC regulation does not conflict with the decision of any court, and the Petition does not even attempt to identify such a conflict.

Finally, there is no substance to petitioners' claim that the decision below should be reviewed because that will resolve intra-circuit conflicts and provide "certainty and predictability" in the Second Circuit. Pet. at 17. Quite apart from the fact that the summary order is a correct application of settled law, the Second Circuit's Rule 32.1(b) provides that "rulings by summary order do not have precedential effect."

II. THE APPLICATION OF *DURA* PRESENTS NO ISSUE FOR REVIEW

Petitioners also ask the Court to review the lower courts' application of *Dura* and their holding that petitioners' separate misrepresentation and omission claims were barred by their failure to allege loss

causation. Petitioners do not contend that there is a conflict between the Second Circuit's decision and the decisions of any other court of appeals regarding the proper application of *Dura*. Instead, they merely assert that over three thousand cases have cited *Dura*. But the volume of cases citing *Dura* does not demonstrate the existence of an important question that is appropriate for review in this Court. Here, the decision below was a correct application of *Dura* and of the uniform decisions of other federal courts of appeals to the unique facts of this case.

Loss causation is an essential element of any securities law claim under Section 21D(b)(4) of the Securities Exchange Act of 1934. In *Dura*, this Court held that loss causation is not adequately pled when a plaintiff alleges only that the alleged misrepresentation or omission caused it to pay an inflated purchase price. Rather, a plaintiff must also plausibly allege that the subsequent decline in price was caused by revelation of the "truth" and not by changed "economic" or market conditions or "other events." 544 U.S. at 343-44, 347. Courts of appeals have thus uniformly held that to plead loss causation, a plaintiff must allege that the stock price later declined in response to either (1) a corrective disclosure that revealed the falsity of the misrepresentations; or (2) subsequent events that "materialized" the risk that was concealed by the misrepresentation or omission. *See, e.g., Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 187-88 & n.3 (4th Cir. 2007); *Ray v. Citigroup Global Mkts., Inc.*, 482 F.3d 991, 995-96 (7th Cir. 2007); *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 175-76 (2d Cir.), *cert. denied*, 546 U.S. 935 (2005); *Robbins v.*

Koger Props., Inc., 116 F.3d 1441, 1447-48 (11th Cir. 1997).

Here, as the District Court held, petitioners' complaint established that the decline in At Home's stock price during the class period was not caused by a corrective disclosure or by the materialization of any risks concealed by the alleged misrepresentations and omissions. The specific alleged misrepresentation here is that At Home's statements that it protected its intellectual property were false because those statements did not disclose that AT&T was misappropriating At Home's intellectual property. But petitioners specifically alleged that AT&T's misappropriations of At Home's intellectual property and AT&T's alleged scheme were "never revealed to the public" during the class period. PTAC, ¶¶ 8, 60. Petitioners' allegations also establish that there was no realization of concealed risks during the class period. For they also alleged that AT&T's copying of At Home's intellectual property "did not diminish the usefulness and general potential of [this] technology" to At Home during the class period (PTAC, ¶ 6) and that AT&T did not actually establish its own network and begin competing with At Home until December 2001, months after At Home had filed for bankruptcy and its stock had lost its value. PTAC, ¶¶ 111-12; PTAC, ¶ 6.

Petitioners' admissions thus established that the stock market learned the "truth" about the alleged misappropriations only after the class period ended and after petitioners' stock had lost all its value due to other changed "economic" or "market" conditions (*i.e.*, the bursting of the Internet stock market bubble). *See Dura*, 544 U.S. at 341-43. In short, the decision below was a correct application of *Dura* (and

of the uniform decisions of other courts of appeals) to the unique facts of this case.

Indeed, the arguments that petitioners now make are all simply challenges to *Dura* itself. They contend that *Dura*'s requirement of loss causation should be eliminated, or relaxed, in cases where intentional conduct is alleged. But intentional conduct was at issue in *Dura*, for *every* case arising under Section 10(b) requires the pleading of an "intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 & n.12 (1976).

Finally, petitioners also contend that loss causation should have been found for two alleged "misrepresentations" that purportedly "directly caused the price of At Home stock to decline" – the December 6, 1999 open access announcement and the March 29, 2000 announcement that AT&T was entering into an agreement to acquire stock from Cox and Comcast that would give AT&T voting control of At Home. Pet. at 31. But the lower courts did not address these claims because they correctly held that the alleged misstatements were not in connection with the sale of securities and were independent of the events that were alleged to have caused *purchasers* of At Home stock to pay *inflated* prices. The latter holding is correct for the reasons stated above, and there plainly is no basis for the Court to review a hypothetical loss causation claim that has not been addressed by lower courts.

CONCLUSION

This petition for writ of certiorari should be denied.

Respectfully submitted,

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